STATE OF MICHIGAN

COURT OF APPEALS

PETER ALLEN KOETJE,

Petitioner-Appellant,

v

KENT COUNTY PROSECUTOR'S OFFICE,

Respondent-Appellee.

UNPUBLISHED
June 7, 2005

No. 252343
Kent Circuit Court
LC No. 03-008449-AZ

Before: Murphy, P.J., and White and Smolenski, JJ.

PER CURIAM.

Petitioner appeals as of right the trial court's declaratory judgment requiring him to register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Petitioner, a resident of Colorado, pleaded guilty of criminal attempt to contribute to the delinquency of a minor by aiding or abetting the possession of controlled substances by the minor, and he was sentenced to prison. Upon being paroled, he relocated to Michigan and filed a petition for declaratory judgment seeking a ruling as to whether he was required to register under the SORA. The trial court entered an order requiring petitioner to register on the basis that the Colorado offense was a "listed offense" pursuant to MCL 28.722(e)(*x*) and (*xiii*). Ruling from the bench, the trial court stated:

> With this direction given to me [reference to *People v Meyers*, 250 Mich App 637, 643; 649 NW2d 123 (2002)], I have examined the behavior underlying the criminal offense and determine that the behavior exhibited by Mr. Koetje with regard to this young woman is subject to the registration, namely, that he being about adult engaged in conduct of a sexual nature with a girl who is 15. Leaving aside whether he drugged her or . . . got her intoxicated for that purpose, minimally, this is criminal sexual conduct in the third degree as recognized by our statutes. And clearly that is conduct of the same nature and character that would justify our registration under our state statutes.

The trial court granted petitioner's motion for stay pending appeal.

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573

NW2d 611 (1998). The construction and application of the SORA presents a question of law that we review de novo. *Meyers, supra* at 643.

The SORA requires a person convicted of a "listed offense," defined in MCL 28.722(e), to register as a sex offender. MCL 28.723(1)(a). MCL 28.722(e)(xiii) is a catchall provision that requires an offender to register if convicted of an offense "substantially similar to an offense described in subparagraphs (*i*) to (*xii*) under a law of the United States, any state, or any country or under tribal or military law." MCL 28.722(e)(*x*) requires an offender to register if he or she is convicted of violating any "law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years of age."

In *Meyers, supra*, a panel of this Court considered the question whether the defendant, who pleaded guilty of violating MCL 750.145d(1)(b), which subsection at the time of the crime referred to using the internet to attempt to commit conduct proscribed under MCL 750.145a (accosting, enticing, or soliciting a child under the age of sixteen years with the intent to induce or force the child to commit an immoral act, to submit to an act of sexual intercourse or gross indecency, or to any other act of depravity or delinquency), was required to register under the SORA pursuant to MCL 28.722(d)(*x*).[1] This Court concluded that to be "by its nature" a sexual offense subject to the SORA, an offense must be inherently sexual. *Meyers, supra* at 647-648. Whether an offense is inherently sexual depends on the conduct that formed the basis for the conviction, regardless whether other kinds of conduct could also be proscribed by the statutory language. *Id*. at 648-649. The Court noted that MCL 750.145d(1) prohibited the use of the internet to commit, attempt to commit, or to solicit another person to commit not only conduct proscribed under MCL 750.145a, but also conduct proscribed under MCL 750.157c (felony inducement), MCL 750.350 (kidnapping), MCL 750.411h (stalking), and MCL 750.411i (aggravated stalking), and indicated that an examination of the facts underlying any offense listed in MCL 750.145d would be necessary to determine whether that offense was sexual in nature. *Meyers, supra* at 648-649. The *Meyers* panel concluded that the defendant's offense, i.e., using the internet to entice a person he believed to be a twelve-year-old child to engage in sexual conduct, was inherently sexual in nature; therefore, pursuant to MCL 28.722(d)(*x*), the defendant was required to register under the SORA. *Meyers, supra* at 649-650.

Here, the underlying conduct and facts that formed the basis of petitioner's Colorado plea-based conviction are not inherently sexual, nor is the offense, relative to the elements forming the basis of the crime, substantially similar to Michigan's statute on third-degree criminal sexual conduct (CSC III), MCL 750.520d (sexual penetration under certain particularized circumstances). Any Colorado offense that was predicated on conduct of a sexual nature was dismissed pursuant to the plea agreement.

The charge to which petitioner pled guilty provided: "Peter Allen Koetje acting with the kind of culpability required for the offense of contributing to the delinquency to a minor, did unlawfully attempt to commit said crime by engaging in conduct constituting a substantial step

[1] At the time *Meyers* was decided, the Court relied on the applicable statutory language defining a "listed offense," which was found in MCL 28.722(d). Today, and applicable here, the definition of "listed offense" is found in MCL 28.722(e). The lower-case, italicized roman numeral subsections under § 722(e) contain, in relevant part, the same language as was found under § 722(d) and applied in *Meyers.*

toward its commission, namely [Koetje] did unlawfully induce, aid or encourage a child . . . to violate a state law, to wit: Possession of a Schedule II Controlled Substance . . . ." Six other counts were dropped by Colorado prosecutors as part of the plea deal, including a second-degree sexual assault charge. The transcript of the plea hearing reflects that the parties waived the "factual basis" and that petitioner pled guilty to the elements of the crime. There were no admissions regarding any sexual acts or improprieties. A Colorado court document confirms that petitioner only pled guilty to the elements of the offense, which do not entail any sexual acts.

Meyers is distinguishable, in part, because the defendant's underlying conduct there, which gave rise to a guilty plea, involved activity of a sexual nature under MCL 750.145a, and said conduct formed the basis of the conviction. While the Colorado sentencing transcript reflects a couple vague references to sexual aggression, any underlying sexual improprieties had nothing to do with the plea-based conviction. Once again, unlawful activities or conduct on petitioner's part that were of a sexual nature formed the basis of other charges that were eventually dropped pursuant to the plea agreement and cannot be considered in the case at bar. Petitioner's Colorado offense is not substantially similar to CSC III, nor based on conduct of a sexual nature. If anything, the Colorado offense is simply comparable to MCL 750.145, contributing to the delinquency of a minor, which is a misdemeanor and not a statutory provision referenced in MCL 28.722(e). Individuals cannot be mandated to register as convicted sex offenders on the basis of dismissed charges or on the basis of convictions for crimes that do not require underlying conduct of a sexual nature.[2] MCL 28.723(1)(a) provides that one must register if "convicted of a listed offense." The definition of "convicted" found in § 722(a) does not include charges that were eventually dismissed, but rather requires a judgment of conviction, which necessarily includes a judgment of conviction that is based on a plea.

With regard to the dissenting opinion, we respectfully disagree with our colleague's analysis. The dissent reads *Meyers* much too broadly, suggesting that *any allegations* of sexual misconduct, whether inherent in the offense charged or not, and regardless of evidentiary support, mandates a criminal defendant to register as a sex offender. The *Meyers* panel stated that a court must "examine the unique nature of the criminal conduct *underlying the charge* that the defendant violated" a law. *Meyers, supra* at 649 (emphasis added). This Court then reiterated that a court must "examine the behavior *underlying the criminal offense* to determine whether it is subject to registration." *Id.* at 650 (emphasis added). The discussion in *Meyers* regarding the necessity to look at the underlying conduct and offense arose out of the recognition that some statutes, such as MCL 750.145a and MCL 750.145d, may or may not apply to crimes that are inherently sexual or have a sexual component. *Meyers, supra* at 648-649. Accordingly, a court must look to the criminal conduct underlying a specific charge despite the fact that the statute, pursuant to which a defendant is being charged, could be applied to nonsexual behavior in other criminal prosecutions. As noted in *Meyers*, "Only the facts of the individual 'offense' itself will reveal whether the [crime] . . . was inherently sexual[.]" *Id.* at 649. The Court stated that "Meyers' online discussion was, 'by its nature,' sexual in that it specifically involved graphic discussions of oral sex, which Meyers hoped to obtain from the person with whom he was conversing over the Internet." *Id.* The sexual online discussion in *Meyers* formed the basis

[2] We note that petitioner asserts that he was not required to register as a sex offender under Colorado law, and the prosecution does not argue to the contrary.

of the conviction under MCL 750.145d and MCL 750.145a. Here, there was no sexual conduct established as underlying the Colorado offense.

Had petitioner, following a jury trial, been convicted of criminal attempt to contribute to the delinquency of a minor by aiding or abetting the possession of controlled substances by the minor, and acquitted of the sex crime that was dismissed here, certainly he could not be required to register as a *convicted* sex offender. It was not established in connection with the Colorado conviction that the Colorado "contributing to the delinquency" offense, which charge was predicated on aiding or abetting the possession of controlled substances, had a sexual component as a matter of fact, or required proof of sexual misconduct.

As desirable as it may be to have an individual such as petitioner register as a sex offender because of the perception, which may indeed be accurate, that sexual wrongdoing occurred, where the offense is not inherently sexual in nature, there must be record support developed through the trial process culminating in a guilty verdict or through admissions that formed the basis of a plea. To rule otherwise would do harm to due process principles.

Reversed and remanded for entry of judgment in favor of petitioner. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Helene N. White